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NEW YORK CLEARING HOUSE

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July 19, 2002

Chief of Records
Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

2002 JUL 23 P 3:12

Attention: Request for Comments

Re: Proposed Rules Governing
Availability of Information

Dear Sirs:

The New York Clearing House Association L.L.C. ("Clearing House")[1] is pleased to comment on OFAC's proposed rule concerning the disclosure of certain information on civil penalties imposed by OFAC and on informal settlements that OFAC makes with

[1] The member banks of The New York Clearing House Association L.L.C. are Bank of America, National Association; The Bank of New York; Bank One, National Association; Citibank, N.A.; Deutsche Bank Trust Company Americas; Fleet National Bank; HSBC Bank USA; JPMorgan Chase Bank; LaSalle Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association. UBS AG, a member of the Clearing House's affiliate, The Clearing House Interbank Payments Company L.L.C., also joins with the Clearing House members in this letter.

financial institutions and others subject to its regulations.'

Under the proposed rule, after the conclusion of a proceeding that results in a civil money penalty or an informal settlement, OFAC will make certain information about the proceeding available. Where the proceeding involves an entity, OFAC will make the following information available to the public:

(1) The name of the entity;
(2) The sanctions program involved;
(3) A brief description of the (alleged) violation;
(4) The amount of the penalty or settlement.

OFAC will publish this information at least quarterly.

If the proceeding involves an individual, only aggregate data that will not identify the individual will be published.

The Clearing House applauds the spirit of openness and transparency that OFAC's proposal indicates, and we support the proposal with some very important caveats: (i) where the entity has itself disclosed its own potential violation, or where OFAC and the entity have reached an informal settlement, the name of the entity should not be disclosed; and (ii) regardless of whether or not the name of the entity is disclosed, it is imperative that the description provide sufficient detail to give the public an accurate picture of the violation or alleged violation.

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[2] 67 Fed. Reg. 41,658 (June 19, 2002).

1. Entity Identification. OFAC should not publicly disclose the names of any entity that has voluntarily reported its own potential violation to OFAC or that has informally settled a case of an alleged violation with OFAC without any finding or admission that the entity violated the law. Our member banks believe that release of the names of entities in these situations would result in little or no benefit to the public but would have a number of adverse consequences for the entities and for the effectiveness of OFAC's programs.

In our members' experience, by far the greatest proportion of "violations" of OFAC's rules are inadvertent ones in which there was no intent to violate the law: a clerk in the letter-of-credit department overlooks the name *of* a Libyan vessel; a bank's interdict software fails to recognize an Iranian intermediary bank. There is no legal requirement for banks to disclose these violations to OFAC. Banks voluntarily report them when they are uncovered by internal monitoring because they want to be good corporate citizens and to establish a record of cooperation with OFAC.

For the same reasons, our member banks frequently decline to exercise their rights to contest OFAC enforcement actions. An important part of these equations has been the fact that up to now there has been little or no adverse publicity resulting from self-disclosure or informal settlements. Public release of information changes this equation by subjecting banks to the potential of unnecessary adverse publicity that is likely to be ill-informed and focused on sensational charges of "dealing with the enemy," with little or no discussion of the inadvertent, technical nature of the alleged violation or whether the bank reported the transaction on its own or otherwise cooperated with OFAC, or whether the bank settled without any admission of guilt.

This kind of adverse publicity will give banks and others a clear incentive not to voluntarily report possible violations, and when potential violations do come to OFAC's attention, to take advantages of all rights in the way of hearings, litigation, and appeals that may be available to them. For these reasons, our members believe that disclosing the names of each entity that has voluntarily reported a possible violation, or informally settled without admitting a violation, is inherently unfair. Our members believe they should be treated in the same manner that OFAC is proposing to treat individuals who may have violated OFAC regulations: by not identifying specific entities.

2. Description of Violation. Regardless of whether or not the names of the entities are publicized in each case, there must be a full and complete description of all the facts surrounding the case. This point arises out of our concern that OFAC may intend the third item on its list ("a brief description of the violation or alleged violation"[3]) to mean the kind of brief description that OFAC usually provides in its prepenalty notices.

Typically, OFAC's prepenalty notices give only a very brief descriptions of the provision that may have been violated. (For example, 'violation of **31** C.F.R. § 550.209, transaction involving the government of Libya.") While such a brief description may suffice for correspondence between OFAC and an institution that is thoroughly familiar with its procedures, it is woefully inadequate for distribution to the public at large. A large majority of the persons who will come across the information in such contexts will have no real knowledge of OFAC's procedures and could easily misinterpret the fact that an institution has settled with OFAC as an indication that the institution has

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[3] **Id.**

deliberately engaged in a direct transaction with an enemy of the United States.

Examples of this kind of misinterpretation can be found in the news reports that followed the recent release of information on OFAC penalties pursuant to Freedom of Information Act requests from the Corporate Crime Reporter. The New York Times began its article with '[a] number of prominent American companies and subsidiaries of foreign concerns have paid cash settlements during the last four years for violating sanctions on trade and investment in parts of Afghanistan under Taliban control, and on North Korea, Libya, Cuba, Iraq and Iran, among others . . . ."[4] While the article discusses several individual cases, including some involving one of our member banks, nowhere does it indicate whether the alleged violations were technical, inadvertent violations, whether the institution voluntarily reported the violation, whether the institution cooperated with **OFAC's** investigation, or whether there were any other mitigating factors that persuaded OFAC to impose a lesser penalty than it could have imposed under the applicable legal provisions. We believe that limited disclosures of this kind can be highly misleading, can do more harm than good, and will not further the purpose of giving the public an accurate account of OFAC's operations.

Other government agencies have exhibited a more balanced approach to the release of information on violations and penalties. For example, the Commerce Department's Bureau of Industry and Security("BIS") publishes considerable information, providing on its web site a copy of its letter charging the respondent with one or more violations, a copy of BIS's final order disposing of the case, and a copy of the agreement (if any)

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[4] U.S. Companies Pay Penalties for Trade with Certain Nations, N.Y. Times, July 3, 2002 *at* A9.

between the respondent and BIS.[5] This information includes such crucial data as whether the respondent reported the violation, whether the respondent cooperated with the investigation, and whether or not the respondent admitted guilt.

We believe that, at a minimum, information about assessed penalties and settlements should contain the following[6]:

Whether the bank voluntarily reported the transaction.

Whether or not the violation was intentional.

The bank's role in the transaction: e.g., intermediary bank in a funds transfer.

Any mitigating factors that were present.

The amount of the penalty, and what category the penalty falls under in OFAC's guidelines.

As an aside, we note that OFAC's internal penalty guidelines have been made public in the final report of the Judicial Review Commission on Foreign Assets Control. As a further measure of transparency, we strongly urge OFAC to publish these guidelines and make them available on its web site.

We also recommend that as part of the settlement process institutions be able to negotiate with OFAC as to how the violation will be described in any public release about the penalty.

Release of full details would provide a valuable public service even if the names of the entities involved are not made

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[5] This information can be found on BIS's website: http://efoia.bxa.doc.gov/

[6] In keeping with our first point, names of individual entities should be redacted from any information released.

public. All affected **U.S.** persons would be able to review transaction details as examples of how things can go wrong in a compliance program. This information can be used to strengthen compliance efforts of affected institutions and to create case studies for internal training. A brief description of the kind ordinarily found in prepenalty notices would not be sufficient to provide these important public benefits.

3. Timing Issues. OFAC's proposal is not specific about when it will publish the information, saying only that OFAC will make the information available "on a periodic basis, not less frequently than quarterly."[7] We believe that OFAC should adopt a regular schedule for publication of this information (e.g., on 10th day of each quarter OFAC would publish information on penalties assessed during the prior quarter). whatever schedule is adopted, if OFAC decides to release names of individual entities, when a case has been concluded OFAC should clearly convey to the institution the date on which information on the penalty will be released to the public. This will allow the institution to be prepared for any inquiries from shareholders or the press.

OFAC also notes that it will begin publishing this information "prospectively."[8] We take this to mean that OFAC will publish details on cases that arise only after the publication of the final rule in the Federal Reqister. We agree that information should be released only prospectively. Institutions that have settled cases or voluntarily disclosed potential violations had no expectation that details of the cases would be published on the internet. It would be unfair to those institutions to apply the new rules retroactively.

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7 67 Fed. Reg. at 41,659.

8 **Id**. at 41,658.

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Should OFAC incorporate the changes we are suggesting, financial institutions and other entities subject to its regulations will be encouraged to continue to enter into settlements and voluntarily disclose errors confident that any release will accurately reflect the inadvertent nature of their conduct and that their identities will be shielded.. More frequent reliance on settlement will relieve OFAC of draining hearings or other protracted processes that may curtail its other important work and waste the resources of the government and private sector alike.

We hope these comments are helpful. If you have any questions, please call Joseph R. Alexander, Senior Counsel, at (212) 612-9334.

very truly yours,

JPN:mlr